SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 303.

JOHN F. HILL, PLAINTIFF IN ERROR,

vs.

WARREN E. McCORD.

In Error to the Supreme Court of the State of Wisconsin.

Brief and Argument on Part of Plaintiff in Error.

Statement of the Case.

The original action was in equity brought by the defendant McCord, to obtain a decree declaring that the plaintiff in error, Hill, held the legal title to the northwest quarter of section seventeen (17), in township forty-eight (48) north, of range eight (8) west, in Bayfield County, Wisconsin, in trust for the plaintiff, that said McCord claiming to be the equitable owner of said tract as grantee of one Philip Jacobus, and that the latter was equitably entitled to a patent of the land from the United States, a patent therefor having been issued to said Hill through a mistake of law on the part of the Secretary of the Interior.

It appears that Jacobus and Hill each made application to enter the land as a homestead, the latter filing a soldier's declaratory statement. Upon a contest made by the former against the allowance of the entry of the latter, it was determined that the said Jacobus had a preference right to enter the land as a settler thereon prior to and at the date of the filing. (P. 38 Rec.) Such entry of Hill was formally cancelled upon the books of the local land office July 7, 1892, and the entry of Jacobus allowed as of July 6, 1892. (P. 59 Rec.)

On the 20th day of September, 1892, Jacobus made final

proof and commuted by paying four hundred ($400.00) dollars, and received a certificate of entry. (P. 285 Rec.)

In December, 1892, the said Jacobus conveyed said land to McCord and McLeod for the expressed consideration of $4250.00. (Ex. "G," p. 286 Rec.)

The Commissioner of the General Land Office, on May 15, 1893, determined that the original entry of Jacobus was made subsequent to the Act of March 3, 1891, which required that parties proposing to commute their homestead entries to cash, must make proof of residence and cultivation for a period of fourteen months from the date of entry, and required Jacobus to furnish supplemental proof showing residence and cultivation for a period of fourteen months subsequent to July 6, 1892, the date of entry, together with *non al* affidavit. (P. 258 Rec.) June 19, 1893, Jacobus filed a motion to review this decision and order, which motion was denied July 6, 1893. (P. 258 Rec.) September 12, 1893, Jacobus made and filed affidavits of McCord and himself, setting forth in substance, that he had conveyed the land to McCord and McLeod in December, 1892. That upon learning that a residence of fourteen months was required, he resumed his residence upon and cultivation of the land. That on the 5th day of September, 1893 (the date of McCord's affidavit), McCord and McLeod had reconveyed the land to him and he had executed to them a mortgage thereon for the full consideration of $4250.00; also that he had resided upon said land since resuming his residence thereon. (P. 261 Rec.) These affidavits are what the defendant has termed the supplemental proofs called for by the Commissioner. October 6, 1893, Hill filed a contest affidavit, alleging that Jacobus did not settle upon or enter said land in good faith to make it his home, but for the purpose of speculation. That on September 20, 1892, Jacobus made final proof and commuted, and within a short time sold the timber and the land and wholly abandoned it. That he did not reside upon the land during the six months next preceding the making of his final proof. That he testified falsely in making his final proof. (P. 292 Rec.) November 18, 1893, the Commissioner directed a hearing upon the questions raised by the contest (p. 259 Rec.), and February 24, 1894, denied

the motion to review the order directing a hearing upon the contest of Hill. (P. 260 Rec.)

In April, 1894, a hearing was had before the local land officers, and on the 9th day of August, 1894, they made their report, in which they stated that the two questions to be passed upon were: First—Did Jacobus abandon the land? Second—Was the sale of the land to McCord and McLeod a bar to the offering of supplemental proof? They did not assume to pass upon any other of the questions stated by the Commissioner to be involved in the contest. (The State Supreme Court reach this conclusion.) The local officers stated in their report: "We think all the circumstances from the time at which the conveyance from McCord and McLeod to Jacobus was made, the execution of the mortgage and the evidence of Jacobus himself, show that the land was not reconveyed to Jacobus in good faith, but for the sole purpose of enabling him to make supplemental proof for the benefit of his grantees," and state their opinion as follows: "We are of the opinion, therefore, that Jacobus' supplemental proof cannot be sustained, and that the entry should be cancelled and a preference right of entry awarded the contestant Hill." (P. 215 Rec.)

January 23, 1895, the Commissioner of the General Land Office made his decision and determination in full, reciting the charges made by Hill and prior proceedings. He specifically found the facts for himself from the testimony given upon the contest, cited precedents, determining that the land was reconveyed to Jacobus, so that he could submit his final proof for the benefit of McCord and McLeod; hence the opinion of the local officers was affirmed and the homestead entry and cash entry were held for cancellation. (P. 266 Rec.)

April 28, 1896, on appeal, the conclusion of the Commissioner in holding for cancellation the entry of Jacobus was affirmed. (P. 268 Rec.)

July 26, 1896, a motion to review the previous decision of the Secretary and confirm the entry of Jacobus on equitable grounds, that the case was in all respects the same as the Herbert Augusta case, in which the entry was confirmed notwithstanding premature commutation, was made, which motion was denied on the ground that the entry was not made in good faith and the proof submitted by the entry-

man was fraudulent, and these were the distinctions between the case at bar and the Augusta case, the essence of the decision in that case being the evidence of good faith on the part of the entryman. At the same time a motion was made to confirm the entry under the provisions of the Act of Congress of June 3, 1896, and such motion was denied in and by the same order and for the same reason, namely, the practice of fraud in making proofs. (P. 269 *et seq.* Rec.)

Thereafter, on September 7, 1896, Hill perfected his right of entry, which was allowed on that day, and on the 12th day of January a patent was issued to him. Subsequently Jacobus conveys to McCord, and McLeod also quit-claims to him.

The Act of June 3, 1896, is as follows:

"Be it enacted, by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever it shall appear to the Commissioner of the General Land Office that an error has heretofore been made by the officers of any local land office in receiving premature commutation proofs under the homestead laws, and that there was no fraud practiced by the entryman in making such proofs, and final payment has been made and a final certificate of entry has been issued to the entryman, and that there are no adverse claimants to the land described in the certificates of entry whose rights originated prior to making such final proofs, and that no other reason why the title should not vest in the entryman exists except that the commutation was made less than fourteen months from the date of the homestead settlement, and that there was at least six months' actual residence in good faith by the homestead entryman on the land prior to such commutation, such certificates of entry shall be in all things confirmed to the entryman, his heirs and legal representatives, as of the date of such final certificate of entry and a patent issue thereon; and the title so patented shall inure to the benefit of any grantee or transferee in good faith of such entryman subsequent to the date of such final certificate: Provided, That this act shall not apply to commutation and homestead entries on which final certificates have been issued, and which have heretofore been cancelled when the lands made vacant by such cancellation have been re-entered under the homestead act.

Section 2. That all commutations of homestead entries shall be allowed after the expiration of fourteen months from the date of settlement.

Section 3. That all acts and parts of acts in conflict with any of the provisions of this act are hereby repealed.

Section 4. That this act shall take effect and be in force from and after its passage and approval.

Approved June 3, 1896."

The allegations of the complaint as to the mistake of law made by the Secretary of the Interior, are in words and figures following, to wit: "Upon said motion for review (referring to the motion made to review his former decision), the Secretary of the Interior by mistake of law erroneously decided and held that the said Jacobus was not within the Act of June 3, 1896, for reasons set forth in the decision of the Assistant Commissioner of the General Land Office of January 23, 1895, hereinbefore particularly set forth, and that in and by said decision said Secretary, by mistake, erroneously so held and decided that because the claimant Jacobus was unable to make supplemental proof after his final or commutation proofs had been made, he was thereby excluded from the provisions of said Act of June 3, 1896, when on the contrary it is the true intent and meaning of such Act of June 3, 1896, to allow commutation homestead entries to be made, provided the claimant was entitled to make the same at the time of submitting his commutation final proofs, which was afterwards held by the Department to be premature, and the construction of said Act of June 3, 1896, in no manner depends on facts occurring after the submission of commutation proofs in any case. That it never was held by any of the officers of the General Land Office or the local land office, or of the Department of the Interior, in any of said proceedings, that the said Jacobus was not an entryman in good faith of the said land, or that there was any defect or fraud whatever in his entry of said land or in his final or commutation proof thereof, but the only fact which was ever held against said Jacobus in said proceedings was that by reason of having conveyed said land after he had obtained said final certificates, to the plaintiff and said McLeod, he was precluded from making supplemental proof as required by the Commissioner of the General Land Office, which supplemental proof became

immaterial and unnecessary under the Act of June 3, 1896; that said office decision of January 23, 1895, did not find any fraud or lack of good faith on the part of said Jacobus, but simply found and held that because he had sold the land after receiving his final certificates, that he could not make supplemental proof, and the plaintiff submits that the decision of January 23, 1895, was correct, inasmuch as said Jacobus did not then own the land, and if the title of said Jacobus depended entirely upon his ability to make such supplemental proof, he or his grantees could never have obtained a patent for said land, but inasmuch as it was found and determined by the Land Department, through all the stages of said preceedings, that he was an entryman in good faith, that his entry was entirely satisfactory down to the time of making final proofs, he was therefore brought clearly within the Act of June 3, 1896, and the Secretary of the Interior by error of law improperly and unlawfully excluded him from the benefits of that Act." (P. 51 Rec.) No other or different mistake is alleged.

Hill demurred to the complaint on the ground that the complaint did not state facts sufficient to constitute a cause of action—which demurrer was sustained by the Circuit Court. McCord appealed from the order sustaining the demurrer to the Supreme Court, which Court reversed the order of the Circuit Court.

The decision of the Supreme Court assumed, though it did not appear in the complaint, that in the affidavits of McCord and Jacobus, called supplemental proofs, "it was not disclosed that Jacobus had sold the land and abandoned his residence upon it, and on trial those proofs were held to be fraudulent, and he refused the land, although the final cancellation of the patent had not then taken place (p. 21 Rec.), and the Court reached the conclusion that in the decision of the Secretary of the Interior in which he characterized the proofs made by Jacobus as fraudulent, and charged Jacobus with the practice of fraud in making proofs, he referred to this concealment of the transfer of the land as the fraud, and the supplemental proofs by reason of such concealment therefrom as the proofs, the making of which was the practice of fraud, and that the Secretary did not pass on the question of fraud in the commutation

proofs of September, 1892. That fraud in the making of such supplemental proofs could not, under the Act of June 3, 1896, have any effect upon the right of Jacobus to the land. The complaint averred there was no fraud; the Court determined there was fraud.

It was also determined that Hill was not estopped from claiming title by reason of his relinquishment upon the first contest to the United States. A motion was made in behalf of Hill for a rehearing, and a rehearing was ordered, but providing that reargument should be confined to the questions,—

1. Whether, as conditions precedent to confirmation under the Act of June 3, 1896, application to the Commissioner of the General Land Office, and proof of the necessary facts before him and findings thereon by him, or either of those proceedings, was made essential.

2. Whether the six months' actual residence in good faith prior to commutation, required by said Act, was required to be subsequent to the date of entry.

3. Whether at the date of the Act of June 3, 1896, Jacobus' entry had been cancelled and the land had been reentered by the homestead act.

4. Whether the rights now claimed by Hill are such that he is estopped to set them up against the plaintiff below, McCord. (P. 27 Rec.)

Upon such rehearing the Court determined the first two questions in the negative. The third it declined to consider, so far as the question of cancellation was involved, withdrawing the statement in the former opinion in respect thereto, but did determine that the land had not been reentered at the date of the passage of the Act of June 3, 1896, within the meaning of the terms of that Act. The fourth it determined it was unnecessary to consider. (P. 28 Rec.)

Subsequently Hill made, filed and served his answer to said complaint (p. 54 *et seq.* Rec.), admitting the making of the several orders and decisions of the officers of the Land Department, recited at length in the complaint, the making of the deeds and mortgages between McCord, McLeod and Jacobus, denying that Jacobus ever established a residence upon said land; that he had been in continual possession and occupancy of the land from February 4, 1891, to September 20, 1892; that he made due proof of his entry, settlement

and improvement of the land on September 20, 1892; that by his proofs he showed more than nineteen months' occupancy, possession and improvement of said land. That he was, in December, 1892, the equitable owner of the land; that he made the statement to McCord and McLeod, stated in the complaint upon which the allegation of estoppel is based, and that such statement was relied upon; that the decision of the Commissioner of May 15, 1893, was erroneous, and that the certificate of entry remained uncancelled after the 28th day of April, 1896.

The answer also denied that the witnesses sworn upon the contest did not give any testimony except as to possession and occupancy and improvement of the land, and that they did not give testimony tending to impeach the good faith of the entry of said Jacobus. All the testimony is set forth in and made a part of the answer, and stipulated in evidence at the trial. The answer further contained denials of the conclusions set forth in the complaint, also denied that the Secretary of the Interior made any mistake of law in his decision of August 4, 1896, and that the construction placed upon it by the pleader was correct; also denied that the Land Department, throughout all the stages of such proceedings, determined that said Jacobus was an entryman in good faith, or that his entry was satisfactory to the time of making his final proofs. The answer also contained a general denial of that which was not expressly admitted.

The application for homestead entry was set out, including the affidavit of Jacobus (pp. 59 and 60 Rec.), and his final and commutation proofs, which were not stated in the complaint (p. 60 *et seq.* Rec.), with an allegation that such proofs were false, stating the particulars wherein they were false. A rule of the Department under Act of June 3, 1856, was also set out. (P. 224 Rec.) The answer also alleged that McCord was not a purchaser in good faith.

The action came on for trial in the Circuit Court upon the issues thus framed, the principal issues being: 1—The proper construction of the Act of June 3, 1896, which was only formal, as the Supreme Court had determined it. 2—The proper construction of the decision of the Secretary of the Interior which the Supreme Court had determined upon the allegations of the complaint, which were admitted by

the demurrer; which decision was not controlling, however, as the supplemental proofs put in evidence disclosed that the facts which the Supreme Court assumed in its former opinion were concealed, to wit, the conveyance of the land to McCord and McLeod and the mortgage back, were fully set forth in such proofs. 3—Whether McCord was a purchaser in good faith. 4—Whether Hill was estopped from claiming the land and his title inured to McCord.

The Circuit Court made its findings of fact and conclusions of law (p. 226 Rec.), most of which relate to questions not at issue before the Court and by which the Court sought to determine for itself whether the entry on the part of Jacobus was in good faith, and also whether fraud was practiced in making his final proofs. Finding also that there was fraud in the making of the supplemental proofs, in that "it did not appear therein that the land was reconveyed by McCord and McLeod to Jacobus for the purpose of enabling him to make proof for their benefit, and that it did not appear therein that he went back upon the land for the purpose of making proof in their interest or for their benefit. (P. 231 Rec.) The trial court also found that Hill made the statement alleged in the complaint upon which the claim of estoppel is based.

As conclusions of law, that Jacobus, by means of the several proceedings, received a complete equitable title to the land. That the entry of Jacobus related back to the date of his settlement upon the land in January, 1891. That his commutation was in all respects according to law. That no supplemental proofs were necessary or required by law. That the conveyance back by McCord and McLeod to Jacobus and the attempted making of supplemental proofs were altogether unnecessary and immaterial. That under the Act of 1896, any concealment or fraud in the supplemental proofs was immaterial and of no consequence. That the decision of the Secretary of the Interior in refusing to confirm the title of Jacobus under the Act of 1896 was erroneous by reason of his mistake of law. That fraud in the making of said supplemental proofs would not prevent Jacobus from receiving title under said Act.

That the defendant (Hill) is estopped from making any claim or asserting any title to the land in question as against the plaintiff.

That the plaintiff is entitled to judgment, etc., and a conveyance.

Exceptions were duly made and filed to said findings and conclusions. (P. 280 Rec.)

Judgment was entered in accord with the findings. (P. 234 Rec.)

The defendant in that action, Hill, appealed from said judgment, and the said appeal came on for argument before the Supreme Court, which rendered its judgment affirming the judgment of the Circuit Court. The Court, in its opinion, state (297 Rec.) that the decision upon the former appeal became the law of the case except so far as the situation was altered by proof. That the propositions decided upon the former appeal were that the officers of the Land Department, in granting Jacobus the privilege of preemption entry in commutation of his previous homestead entry, decided that his entries were made in good faith. (That is, the act of granting the privilege of preemption entry was a decision that the entry was in good faith.) That he had resided upon the land in compliance with the homestead laws for at least six months prior to said commutation, and that his final proofs, upon which the preemption entry was allowed, were not fraudulent. (These proofs were not in the complaint, nor was their contents in any manner stated or referred to.) That the Secretary of the Interior, nor the Land Officers, had never reversed such findings of fact, and that the rejection of the supplemental proofs went upon the ground of fraud occurring therein. That such fraud was no obstacle to Jacobus' right of confirmation. Hence that the refusal of such confirmation and the allowance of Hill's entry and subsequent patent were all by mistake of law, and conferred upon Hill the empty legal title only, which the United States held in trust for Jacobus, who held the full equitable title under the Act of 1890. "Hence our former ruling, that the facts of good faith entry, six months' residence and honest final proofs had been decided to exist by the land officers, must control now." The Court admits that the assumption of concealment of facts in the supplemental proof in the former opinion was a mistake and untrue in fact, but notwithstanding, it is stated that "examination now made of the record of the contest shows

that the fraud which was pointed out in the opinion of the local officers, the decision of the Commissioner and of the Secretary, *was in attempting to impress those tribunals with the idea that he, Jacobus, had in good faith* re-acquired the title to the premises for the purpose of making the premises his home, and not for the forbidden purpose of acquiring title for someone else. The record discloses now, as on the former appeal, that there was in the supplemental proofs concealment of a purpose which the land officers decided to exist, and that such concealment was by them decided to constitute a fraud."

The Court admits that its statement in the former opinion that "no suggestion was made in Hill's contest affidavit, that the commutation proofs were characterized by any fraud or fraudulent practice, and no issue as to the *bona fides* of Jacobus in tendering those proofs was presented," is contrary to the fact, and state an issue was raised by which the land officers could have inquired or decided with reference to fraudulent practices in the commutation proofs, but determine that such issue was not determined by the local land officers upon such contest, and hence was not determined either by the Secretary of the Interior or the Commissioner of the General Land Office, and the Act of granting the commutation entry by the local land officers stands as the evidence and the only evidence of a decision that there was no fraud practiced in making the commutation proofs, because, as the opinion states, they must necessarily have decided there was no fraud in granting the certificate, and hence these facts entitled Jacobus to confirmation and patent under the Act of 1896.

In the opinion no reference is made whatever to that part of the decision of the Secretary of the Interior denying the motion for review (p. 272 Rec.) which states: "The very essence of the decision (Herbert Augusta, 21 L. D. 200) confiming the entry in that case, was the evidence of good faith on the part of the entryman. The evidence in the case at bar clearly shows that the entry was not made in good faith, and the proof submitted by the entryman was fraudulent."

The Court determines that Hill was estopped from claiming the land as against McCord; that on this ground as well, if their determination of the other question is incorrect

Hill must be charged as trustee of the whole title of McCord and decreed to convey it to him.

The Court disaffirms the finding and conclusion of the trial Court, in substance, that Jacobus was entitled to commute at the time he made his final proofs. The Court affirms the finding that McCord was a purchaser in good faith.

The questions involved have been brought to this Court for review by Writ of Error.

Questions Involved.

1. The construction of the decision of the Secretary of the Interior, of date, August 4, 1896.

Whether he there determined that Jacobus was excluded from the benefit of the Act of June 3, 1896, solely by reasen of his inabilty to make supplemental proof, on account of his sale of the land.

Whether he referred to the commutation proofs, or to the so-called supplemental proofs, in stating that his proofs were fraudulent and the practice of fraud in making proofs.

Whether he there determined that the entry of Jacobus was not made in good faith, and if he referred to the supplemental proofs, was his conclusion a mistake of law?

2. Whether the defendant here can avail himself of a mistake of law other and different from the one alleged, and especially where in his complaint he expressly negatives the mistake now urged.

3. The construction of the Act of June 3, 1896. Whether Jacobus was within or brought himself within the provisions of that Act.

4. Whether facts entitling Jacobus to a patent not only existed but were decided to exist by the Secretary of the Interior, and his decision was predicated upon a mistake of law to the facts already decided to exist.

5. Whether it was within the power and duty of the Secretary of the Interior to refuse a patent for fraud practiced in making supplemental proofs.

If the defendant here is precluded from insisting upon any other mistake than the mistake alleged in his complaint, then of course the other questions stated are not involved.

6. Was the plaintiff in error precluded by the doctrine of estoppel from acquiring a patent to the land, and if so, could the defendant avail himself of that estoppel to ac-

quire title through such plaintiff, especially in the absence of a showing, that but for the mistake of law on the part of the Secretary of the Interior he or his grantees would have been entitled to and would have received such patent.

7. Whether the decision of the State Supreme Court upon demurrer could establish the law of the case, it not being the highest court qualified to pass upon the question.

Specification of Errors.

1. The Supreme Court of the State of Wisconsin erred in its construction of said Act of June 3, 1896,—

a. In determining that application could be made to the Secretary of the Interior to confirm a commutation entry, and especially where made upon the original records, and without an affirmative showing of the conditions expressed in said Act.

b. In determining that the six months' actual residence in good faith by the entryman on the land required to be made to appear to the Commissioner of the General Land Office, was not the six months immediately preceding the act of commutation, but six months' actual residence at any time after settlement upon the land.

c. In determining that the words "re-entered under the homestead act," being the concluding part of the proviso in the said Act of June 3, 1896, meant only an entry allowed of record and did not include the preference right of entry awarded upon contest to the contestant.

2. The circuit court erred in determining that there was not, on June 3, 1896, or at any time prior to the entry made by Hill on September 7, 1896,—

a. Fraud practiced by Jacobus in making his commutation proof.

b. Any adverse claimants to the land, or of any entry, whose rights originated prior to the making of such final commutation proofs.

c. That there was no other reason on June 3, 1896, or subsequent, why the title to said lands should not vest in Jacobus as provided by his said certificate of entry.

d. That there was more than six months' actual residence by Jacobus on the land prior to the making of his commutation proofs of September, 1892.

e. That the land was not re-entered by Hill or any other person until September 10, 1896.

f. That the preference right of entry awarded Hill was not within the proviso of the Act of June 3, 1896,

and it was error in the Supreme Court not to have reversed or disapproved of such findings, and to have determined either they were irrelevant and incompetent, or, if otherwise, that there was no evidence whatever in support of the five first mentioned, and that, as to the sixth, it was an erroneous construction of the law.

3. The Court erred in determining that the entry of said Jacobus and his proofs were such as to bring his entry within the provisions of the Act of June 3, 1896, and that his said entry and proofs entitled him to confirmation of his entry under said Act.

4. The Court erred in its construction of the decision of the Secretary of the Interior of date, August 4, 1896, in determining that in and by said decision of the Secretary, in his statement therein, to wit, "The evidence in the case at bar clearly shows that the entry was not made in good faith and the proofs submitted by the entrymen were fraudulent," referred only to the supplemental proofs, so called. That the Secretary referred soley to the supplemental proofs in stating in said decision, "It is likewise impossible to confirm the entry under the provisions of the act of June 3, 1896, for the same reason, namely, the practice of fraud in making proofs," and not to the original or commutation proofs.

5. The Court erred in determining that any mistake of law whatever was made by the Secretary of the Interior in his decision of August 4, 1896, of the motion of Jacobus to review the previous decision of the Secretary or in deciding the motion to confirm the entry of Jacobus under the Act of June 3, 1896.

6. The Court erred in determining that the register and receiver of the local land office, by the act of accepting and allowing the commutation proofs of Jacobus and issuing to him the receipt and the certificate of entry, found that Jacobus had resided upon said land continuously from the 4th day of February, 1891, had cultivated and improved the same, and *fully complied with all the requirements of the law in regard to the same as a homestead entry*, and that such determination had never been questioned or reversed by either the Commissioner or the Secretary, and hence from

said act alone, Jacobus was equitably entitled to a patent, notwithstanding the decision of the Secrectary to the contrary.

7. The Court erred in determining, as stated in the last opinion, that they so decided in a former one, that the officers of the Land Department, in granting Jacobus the privilege of preemption entry in commutation of his previous homestead entry, decided that his entries were made in good faith, and that his final proofs upon which the preemption entry was allowed, were not fraudulent, and in determining further that this finding of fact had not been reversed.

8. The Court erred in determining that there was fraud and concealment in the supplemental proofs.

9. The Court erred in determining that Hill would be estopped from obtaining title or patent to said lands by his acts prior to the initiation of said contest, in case their determination of the other issues were incorrect and that the title would, by reason of such estoppel, be held in trust for the defendant here, McCord.

10. The Court erred in affirming and determining as to such estoppel upon oral evidence.

11. The Court erred in assuming and determining that a mistake of law was made by the Secretary of the Interior, other and different from that alleged in the complaint, when in fact no such mistake of law as alleged in the complaint was made, or determined to have been made, nor was the patent denied the said Jacobus upon the ground stated in said complaint.

12. The Circuit Court erred in determining for itself what were the facts relating to the entry, settlement and residence and improvements upon the land by Jacobus, from the evidence and record in the case, and in predicating its judgment thereon, instead of upon the facts as determined by the Commissioner of the General Land Office or Secretary of the Interior appearing in their official decisions, among others, the following, to wit:

a. That it appeared from the testimony taken upon the contest instituted by Hill, that Jacobus had resided upon the land with his wife, was there most of the time from the time of his settlement in February, 1891, until the sale of the land to McCord and McLeod in December, 1892.

b. That Jacobus had no other home.

c. That he was necessarily absent for the purpose of earning a living for himself and wife and money with which to improve his homestead.

d. That he fully complied with the law as to such residence, occupation and improvement of said land.

e. That the commutation proofs presented by Jacobus Sept. 20, 1892, were truthful and in no manner fraudulent, and it was error for the Supreme Court, exceptions having been duly taken to such findings, to affirm the same, or if not expressly affirmed, not to have disapproved such findings. It was also error on the part of the Supreme Court, if the question was one proper for their determination, not to have determined that Jacobus had not complied with the law as to residence, occupation and improvement of the land, and that the commutation proofs submitted by Jacobus were in fact false and fraudulent.

13. The Court erred in determining that the said Jacobus had a complete equitable title to the land which inured to the defendant McCord, and determining that said defendant was entitled to judgment and decree according to the prayer of his complaint, and in awarding and affirming the judgment in the action in favor of the defendant and against the plaintiff in error.

14. The Court erred in determining that the questions passed upon by the Supreme Court upon demurrers, were *res adjudicata* upon the final hearing upon the merits.

15. The Court erred in determining that the complaint stated a cause of action and reversing the order of the Circuit Court sustaining the demurrer.

16. The Court erred in determining that McCord was a purchaser in good faith.

Argument.

There were three decisions of the State Supreme Court upon questions involved or asserted to have been involved in the action. The first two were rendered in determining the sufficiency of the complaint upon appeal from an order sustaining a demurer thereto. By the last decision it is asserted that matters presented upon the appeal from the judgment were *res adjudicata* by reason of the former decisions. Some of the questions so adjudged are specifically

stated, others are left to inference, and confusion arises from the fact that the specific ground upon which the former decisions were based, to wit, that of concealment of the fact of conveyance by, and reconveyance to Jacobus of the land, was concealed in the supplemental proofs so called, appeared upon the second appeal to have been untrue and contrary to the fact, and the Court then changed completely from the position first assumed. It had also determined that the local land officers had decided in their report upon the contest that the entry was in good faith, that the Commissioner had approved of the opinion thus declared and the Secretary had affirmed it, and that the fraud stated in the decision of the Secretary related to concealment of the facts in the supplemental proofs. In and by the last decision it is determined that the local land officers did not pass upon that question, though the issue was present; that the Commissioner did not pass upon it. That it has never been determined, except by the mere act of the local land officers in issuing the certificate upon commutation, no reference being made to that part of the decision of the Secretary which expressly states that the entry was not made in good faith. It seems quite difficult to ascertain in view of this change of position, to what extent the opinions and decisions first rendered are applicable, and to formulate specific statements of error. Out of abundant caution it may be, that errors are alleged that are not important for consideration by this Court.

The first subject involved is the proper construction of the Act of June 3, 1896, and the rulings of the State Court in respect thereto, specified as errors (1, 2 and 3, specifications.) The defendant's right is claimed solely under the provisions of that Act. This act is set out in full in the printed transcript, page 49, and in this brief, pages 4 and 5.

The first proposition is, whether there is required an affirmative showing on the part of the entryman of the conditions there expressed, or whether the previous record is sufficient of itself to confirm the entry. In other words, whether the law is self-executing. The language is, "When it shall appear," not "When it shall have appeared." I have classified the conditions as follows:

1. That an error has heretofore been made by the

officers of the local land office in receiving premature commutation proofs, under the homestead laws.

2. That there was no fraud practiced by the entryman in making such proofs.

3. That final payment has been made.

4. That a final certificate has been issued to him.

5. That there are no adverse claimants to the land whose rights originated prior to such final proofs.

6. That no other reasons exist except the making ofsu ch premature commutation.

7. That there was at least six months' actual residence by the entryman prior to such commutation.

It would seem that the record itself would determine the first, third and fourth conditions, these being the factsof premature entry, final payment and issue of the certificate. The other conditions would not necessarily appear in the original record, to wit, that fraud was not practiced by the entryman in making his commutation proofs. That there are no adverse claimants whose rights originated prior to the making of such proofs. That no other reason exists why the title should not vest in the entryman, except the premature commutation, and that there was at least six months' actual residence by the entryman, prior to such commutation, and hence it would seem absolutely required that these matters should be made affirmatively to appear. How could the Commissioner determine whether fraud had been practiced in making proofs from the record itself? If fraud appeared upon the face of the proofs, there certainly would have been no commutation certificate or entry, and hence the Act would have no application. The position of the State Court seems to have been that, notwithstanding the proofs were fraudulent, as in this case, such fraud not appearing on the face of the proofs, confirmation follows as a matter of course. Fraud would only appear by extrinsic evidence, and if it be true that the Commissioner or Secretary must examine the record to ascertain the character of the final proofs, then in the case at bar such proofs, in connection with the evidence upon the contest, would disclose and did disclose that the proofs were fraudulent.

The contention on the part of the plaintiff in error is that this Act provides a new and independent proceeding before the Commissioner (not the Secretary of the Interior),

upon new proofs to be presented to him, in the light of all the conditions existing up to the date of such proceeding. That the required conditions must be made to appear affirmatively as conditions precedent. That fraud in making such proofs must be negatived by evidence of good faith; that six months' actual residence from and after the date of the entry and prior to such commutation must be shown.

Such seems to have been the judgment of the Land Department. A circular was issued therefrom (26 L. D. 54) construing said Act, wherein it was stated: "Where the cash certificate in a case coming within the provisions of the statute has been cancelled, it will be necessary for the parties in interest, if they desire a reinstatement of the same and the confirmation of the entry, to file in the proper land office an application for such action. You will forward the application to this office for consideration, accompanied by a full report as to the status of the land embraced in the entry, the confirmation of which is desired." This was to enable the Commissioner to know the status of the land at the time, whether other parties had or claimed rights therein; whether a contest might be pending so as to enable him, among other things, before concluding such parties, to order a hearing and investigate, if an investigation had not already been had.

It is respectfully urged that the Act in question gives a permissive right to an entryman who had made an honest mistake of premature commutation, of restoration to his original rights, lost by such mistake, upon his establishing to the satisfaction of the Commissioner certain prerequisites, among which are good faith in making his final proofs, the absence of any adverse meritorious claimant whose rights will be prejudiced; actual residence upon the land in good faith for six months immediately prior to his commutation, and then if there are no other reasons which in equity ought to preclued the restoration of his entry, the Commissioner may confirm the same. A sufficient reason to deny confirmation might be the fact, that upon a contest had, a right of entry had been awarded another, or that it appeared upon such contest, the entry was not in good faith or the proofs were fraudulent. At least the Commissioner must have the opportunity of determining whether sufficient reasons exist for refusing confirmation. The Act

merely permits an appeal to the equitable discretion of the Commissioner.

The proviso in said Act relates to another class of cases. As we argue later, such cases are not within the provisions of the Act at all. The plaintiff in error contends, further, that the discretion provided by the Act is confined to the Commissioner. It begins and ends with him, and is independent of that general discretion and supervision vested in the Secretary of the Interior, which can be originally exercised.

Six months' actual residence prior to commutation. Our contention is that the six months' actual residence must be subsequent to the date of entry.

Previous legislation and statutes in force at the time of the passage of the Act may be exmined in determining this question. Section 2301, Revised Statutes 1878, provided for making proof of settlement and cultivation upon commutation as provided by law granting preemption rights. Such statute required the erection of a house, etc., and further provided that rules and regulations should be promulgated by the Land Department. Such Department promulgated regulations, one of which provided for six months' actual residence as evidence of genuineness of settlement. (Rules L. D., issued July 11, 1899, page 262.) Subsequently the right of preemption was taken away entirely and commutations were made upon six months' actual residence after entry.

The Act March 3, 1891, amended section 2301 so as to read as follows: "Nothing in this chapter shall be so construed as to prevent any person who shall hereafter avail himself of section 2289 from paying the minimum price for the quantity of land so entered at any time after the expiration of fourteen *calendar months from the date of such entry* and obtaining a patent thereof, upon making proof of settlement and of residence and cultivation for such period of fourteen months."

The uniform decisions of the Land Department after the passage of such Act were to the effect that commutation could not be made until fourteen months after *date of entry*, and was applied to the entry of Jacobus, who commuted in about two months after the date of his entry. The purpose and effect of such act was to extend the time from six

months after date of entry, as construed and applied by the Department, to fourteen months.

Such was the state of the law until the Act of June 3, 1896. That Act provides, "That it shall appear there was at least six months' actual residence in good faith by the entryman *prior to such commutation.*" The plain intention of this provision was to restore the period of actual residence prior to commutation as it existed prior to the amendment of March 3, 1891 (premature commutations having been allowed in ignorance of that Act), where commutation had been made, and thereafter in new cases, by section 2 of said Act, to make the fourteen months commence from date of settlement instead of date of entry.

Such is the construction placed upon this provision of the Act of 1896 by the Land Department. In the circular hereinbefore referred to (26 L. D., 544) it is stated with reference to section 2: "Constructive residence from date of entry will be recognized where settlement is made within six months after allowance of the filing of the entry. The party establishing his residence, the whole of such six months will be allowed, and not merely from the day of actual residence." This evidently in conformity to the provisions of the Act of May 14, 1880, sec. ; Revised Statutes. Jacobus' commutation was in about two months after date of entry.

However, it never appeared to the Commissioner or Secretary that there was six months' *actual* residence upon the land by Jacobus prior to commutation, either before or after allowance of his entry. On the contrary, it appeared to the Commissioner and the Secretary as well, that Jacobus had not at any time an actual residence upon the land, and it is so expressed in the decision of the Commissioner of January 23, 1893, wherein he states: "He (Jacobus) was absent nearly all the time, making an occasional visit on the Sabbath day. His wife stayed (not resided) on the land a part of the time." Constructive residence would not satisfy the law.

It is therefore evident that in this respect Jacobus was not within the provisions of the Act.

Cancellation of Entry.

The State Court declined to pass upon the question whether the entry of Jacobus was cancelled by the final

decision of the Secretary of the Interior, April 28, 1896, saying it was a question properly for the Federal Courts.

The Act of 1896 contains the following proviso: "Provided, that this Act shall not apply to commutation and homestead entries on which final certificates have been issued and which have heretofore been cancelled, when the lands made vacant by such cancellation have been re-entered under the homestead Act."

The decision of the Commissioner was that the certificate was held for cancellation. Evidently so held for the purpose of appeal. The decision of the Secretary upon appeal confirmed that of the Commissioner. This was the final act. It operated to cancel the entry to all intents and purposes without further act. Such has been the uniform decisions of the Land Department.

Land Decisions, Vol. 6, page 563.
" " " 7, " 163.
" " " 19, " 547.
" " " 20, " 191.
" " " 22, " 77.

Such being the established rule and practice of the Land Department, the presumption is that Congress, in enacting the statute in question, used the word "cancelled" in the sense so long given to it by such Department.

Hawley v. Diller, 178 U. S., 487-488.
United States v. Philbrook, 152 U. S. 52.
United States v. Johnson, 124 U. S. 253.
United States v. Alabama, 142 U. S. 621.

Was the land re-entered by the Homestead Act?

The report of the local land officers (p. 215 Rec.), August 9, 1894, was that "the entry of Jacobus should be cancelled and a preference right of entry awarded the contestant Hill." This opinion was affirmed by the Commissioner (p. 217 Rec.), and the conclusion of the Commissioner was affirmed by the Secretary, April 28, 1896. (P. 219 Rec.) Jacobus, by delays and appeals, prevented the entry from being formally allowed until September 7, 1896.

The exact question is, whether the allowance of a preference right of entry to Hill in August, 1894, in connection with the subsequent proceedings of the Department, the

allowance of his entry on September 7, 1896, and the subsequent issue of a patent to him, constituted, within the meaning of the proviso of the Act of June 3, 1896, a re-entry under the homestead laws.

Again we refer to previous legislation. Section 3 of the Act of May 14, 1880, reads as follows: "That any settler who has settled or who shall hereafter settle on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States Land Office as is now allowed to settlers under the preemption laws, to put their claims on record, and his right shall *relate back* to the date of settlement, the same as if he settled under the preemption laws."

The Secretary of the Interior, construing this Act, states: "That it conferred a special power upon the successful contestant, namely, the right, as against all others, to enter the tract in dispute upon the successful termination of the contest, thereby securing to him a reward for the *time and money* spent in such contest."

4 Land Decisions, 580.

This accords with the doctrine of this Court, where it is stated: "The party who takes the initiatory steps in such cases, if followed up to a patent, is deemed to have acquired the better right as against others to the premises. The patent which is afterwards issued relates back to the date of the initiatory act and cuts off all intervening claims."

Shipley v. Cowan, 91 U. S. 330,

The initiatory step is taken when the contest is initiated.

4 Land Decisions, 580.

The Land Department gives construction to the word "re-entered" where used in a similar act. The second section of the Act of June 15, 1880, provides: "That persons who have heretofore, under any of the homestead laws, entered lands properly subject to such entry, * * may entitle themselves to such lands by paying the government price therefor. * * *Provided*, this shall in no way interfere with the rights or claims of others who may have *subsequently entered* such lands under the homestead laws."

It was stated: "It has been uniformly decided by this Department, that the right of purchase under said section depended upon three conditions: 1—That the entry was made prior to June 15, 1880; 2—That the land entered was properly subject to entry; and 3—That the land has not been subsequently entered or *a prior right of entry has not been subsequently acquired by some other person.*

4 Land Decisions, 463. Citing five prior cases.

Independent of any statute, the doctrine of relation would seem to be applicable. The application to enter being a legal one at the time, was, while pending, equivalent to an actual entry. The actual allowance of an entry deferred relates back to the inception of the right. Hence, when the entry of Hill was actually allowed, which could not be until the contest proceedings were concluded and it was finally determined the lands were vacant, such entry related back to 1894, and such date, we respectfully urge, is the date of entry within the meaning of the proviso of the Act of 1896. The land became vacant April 26, 1896, the date of the final order cancelling the Jacobus entry. Hill's right at that time was not only a preference right, but the only right. The rights of Jacobus, if any, became extinguished. Thereafter his right, if any, depended solely upon the provisions of the Act of 1896. That Act, we contend, was intended solely to grant relief to an original entryman, only where no other valid, subsisting right had intervened. Hill had conducted the contest through all the departments, had paid all the expenses, and had succeeded. It ought not to be presumed the legislative intent was to deprive him of the fruits of his efforts.

Construction of the decision of the Secretary of the Interior of date August 4, 1896

The next question involved and embraced in the specifications of error is, the construction of the decision of the Secretary of the Interior, of date August 4, 1896. (4th, 5th, 6th, 7th and 8th Specifications of Error.)

The contention on the part of the plaintiff in error is, however, that the mistake as found by the State Court was one of fact and not of law? That the question of a purchaser, or an entry in good faith is one of fact and not of law.

Gordon v. Bonesteel, 180 U. S. 362.

Another rule is that equity does not interpose when the alleged mistake relates to a matter of fact, concerning which the officers of the Land Department have drawn wrong conclusions.

Lee v. Johnson, 116 U. S. 48.

The Secretary of the Interior determined that the entry of Jacobus was not in good faith. That his proofs were fraudulent. That he practiced fraud in making proofs. These were questions of fact, not of law.

There can be no question as to the proper construction to be given to the language of the Secretary in his final decision of August 4, 1896, if such language be given its ordinary and well-recognized meaning. When it said that an entry is made in bad faith or the reverse, the meaning is absolutely clear and well understood. When it is said that proofs are fraudulent, it ordinarily means such proofs as are before the officer, and which the law under which his determination is to be made, requires him to determine. It is equally clear that when such officer determines that an entry is in bad faith, and states in the same connection that the proofs are fraudulent, he is presumed to refer to such proofs as were made to complete the entry, as an entry, made in bad faith, if allowed, must necessarily have been allowed upon proofs which were fraudulent.

The construction placed upon such decision by the State Court is one of conjecture merely, at variance with the ordinary meaning of the words, not sustained by a scintilla of evidence. It is hardly consistent with the declaration of that Court, "that it must appear clearly and without substantial doubt, that the facts entitling Jacobus to the land not only existed, but was decided to exist by the executive officers of the Land Department."

The general rule for the construction of statutes is that in ascertaining the legislative intent, resort must be had to the language used. If that is plain and unambiguous, interpretation is not allowable.

Ogden v. Glidden, 9 Wis. 46.
Gilbert v. Dutroit, 91 Wis. 661.

Where a law is expressed in plain and unambiguous terms,

whether those terms be general or special, the legislature should be intended to mean what it has plainly expressed.

Lake County v. Rollins, 130 U. S. 662.

To get at the thought or meaning expressed in a statute, the first resort in all cases is to the natural signification of the words in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning apparent upon the face of the instrument must be accepted, and neither the Courts nor the legislature has the right to add to or take from it.

Newall v. People, 7 N. Y. 997.
Lake County v. Rollins, 130 U. S. 662.
Battles v. Hamlin, 22 Wis. 669.

The motion to review the former decisions was based upon the statement that the case at bar was in all respects similar to the Herbert Augusta case, page 269 Rec., 21 L. D. 200. The Secretary held that "the very essence of the decision confirming the entry in that case was the evidence of good faith on the part of the entryman. The *evidence* in the case at bar clearly shows that the entry was not made in good faith, and the proof submitted by the entryman was fraudulent, as fully set out in your office decision of January 23, 1895."

It thus appears that his attention was directly called to the evidence given upon the contest. It was also directly called to the question of good faith of the entry, and necessarily was called to the question of the proofs submitted to complete the entry. If the entry was in bad faith, the proof was necessarily fraudulent. He determined it was fraudulent from the *evidence* in so many words.

The proofs were fraudulent as matter of fact and law. These proofs appear page 60 *et seq.* record. The following questions were contained in such proofs:

Question 5: Of whom does your family consist; and have you and your family resided continuously on the land since first establishing residence thereon?

Answer: Wife and myself. Yes, we have. We had no other home but this.

Question 6: For what period or periods have you been

absent from the homestead since making settlement, and for what purpose; and if temporarily absent, did your family reside upon and cultivate the land during such absence?

Answer: I was absent at different times two or three weeks at a time, earning money to support my family and improve my place. Never was absent exceeding three weeks at any one time, and my wife has always lived continuously on the land.

The decision of the Commissioner to which the Secretary refers contains the following statements: (P. 217 Rec.) "It is shown by the evidence that defendant had a small log house on the land; that it was well finished and well furnished; that he had about two acres cleared; that the improvements were worth about $200. *He did not have any stock of any description, no chickens or other poultry*; that on December 27, 1892, defendant *sold said land* to Daniel McLeod and W. E. McCord for $4,250 *cash*.

On the question of residence, the testimony is very conflicting. Defendant's wife stayed (not resided) on the land a part of the time, and the defendant worked in his barber shop in the town of Iron River, and stayed there *nearly all the time*, working at his trade. *He made occasional visits to the land on the Sabbath day*.

Some of the Evidence upon the Contest to which the Secretary Refers.

Jacobus testifies in the contest proceedings (p. 155 Rec.), in answer to the question, "What time were you on the place during the spring and summer season of 1892?" Answer: "I would go out every Sunday." (P. 142 Rec.)

Again: Was at Superior barbering in 1891. Quit there to start up same business at Iron River last part of April, 1892. This was prior to the time I got my filing. I was on the place on Sundays in January, 1892, but my wife wasn't. I was there every Sunday in February, March, April, May and June. No, I wasn't out there every Sunday in January and February. Of course, I was working at Superior at the time. (Pp. 155 and 156 Rec.) Maybe I was out twice a month in March and April.

My wife was visiting at Chippewa Falls. This was prior to the burning of Iron River village. She went at that time, and again in 1893. This is the time she always goes

to Chippewa. In the winter time. Them months. (P. 161 Rec.)

Mrs. Jacobus testified: In answer to the question, "Just commence the first of the year. State definitely the particular times you were there in 1892?" Answer: I went there Easter, and stayed about a week in Iron River. Then I went to Superior for a few days, and came back and went out on the claim, and I was sick. Then I went on the claim again and stayed there until June. (P. 172 Rec.) I stayed a week on the claim in February, 1892. I went out in the last part of March or April. I disremember just—— And then I was sick with rheumatism. (P. 173 Rec.) I went back the Sunday after the 4th of July. I stayed there then until we proved up. (P. 174 Rec.)

Question: These times you were out there, particularly the six weeks in 1891, how often was Mr. Jacobus out to see you?

Answer: He was in Superior then. He didn't come so often then. He used to come every two weeks, and it has been as much as three weeks. He would come out on Sundays. (P. 178 Rec.)

Such testimony is in direct contradiction of his answers as to continuous residence made in his commutation proofs.

The Commissioner, however, in his decision referred to, went further in characterizing the entry as in bad faith and the proofs as fraudulent. He states: "The case of Alonzo W. Laird is very similar to the one at bar. In that case it was held that, 'one who enters with no intention of establishing residence in good faith and subsequently submits fraudulent final proofs, cannot cure the wrong and acquire title to the land by returning to the same after said proof has been rejected and his entry held for cancellation.'"

Here was an emphatic declaration that Jacobus' entry was with no intention of establishing residence in good faith. The evidence upon the contest showing the sale for $4,250.00 cash and commutation within two months after entry allowed, the fact that Jacobus had made no preparation for a permanent home, the fact that he had not provided a horse, a cow, a pig, not even a chicken, and the fact that he was absent from the land practically all the time, making an occasional visit on Sunday, and that his wife merely stayed on

the land a part of the time, was sufficient to convince him that the entry was not in good faith. The direct question before him, and the only one which was decided by the local land officers, was whether Jacobus should be permitted to make supplemental proofs, in view of the fact he had sold the land, and he directly affirmed their opinion in this respect. He first disposed of the equities, then the law. It was to this part of the decision of the Commissioner the Secretary had reference, where he states, "The *evidence* in the case at bar clearly shows that the entry was not made in good faith, and the proof submitted by the entryman was fraudulent, *as fully set* out in your office decision of January 23, 1895." It should be kept in mind no supplemental proofs had ever been made, only affidavits presented to the Commissioner showing that it was impossible to comply with the order requiring such proofs as the land had been sold.

In the Herbert Augusta case, application was made to the Secretary by the grantees of Augusta to confirm the entry (not under the Act of 1896; it was prior to such Act) on equitable grounds. That they had purchased the land on the faith of the certificate, and as there was no intervening right, they should be protected. It was also a case of premature commutation. The Secretary in deciding that application uses the following language: "If it is within the scope of the equitable jurisdiction of the Department to protect such transferees without violation of law, I think such protection should be extended."

The purpose was to protect the transferees. The equity was theirs. Acts of the entryman subsequent to his conveyance to them would not impair their equities. The motion to review in the case at bar (see motion, page 220 Rec.) was based upon the decision in the Augusta case. The equities of the transferees was the same in both cases if McCord was a purchaser in good faith. The distinction, however, between the two was as stated by the Secretary, that the entry in the Augusta case was in good faith (as shown by his continuous residence on the land for three years), while in the Jacobus case the entry was not in good faith and his proofs were fraudulent. The affidavits stating why Jacobus could not make supplemental proof, were after the transfer to McCord and McLeod; hence any fraud in

such affidavits or any secret purpose on the part of Jacobus, would not affect the equities of such transferees. How, then, can it be said the Secretary, in referring to proofs as fraudulent, had any reference whatever to such affidavits.

Further: The Secretary at the same time was requested to confirm the entry under the Act of June 3, 1896, and he states: "It is likewise impossible to confirm the entry under the provisions of the Act of June 3, for the same reason, namely, fraud in making proofs." This is in the language of the Act, "and there was no fraud in making such proofs." Entry in good or bad faith is not specifically mentioned in the Act. So the Secretary, after determining the entry was in bad faith, which implied fraud in the final proofs, uses the language of the Act. The Act itself designated final proofs made upon premature commutation. The Act evidently was before him. It cannot be assumed he did not understand its provisions, and that he referred to something not within the Act, and especially when the final proofs were in fact fraudulent. The presumption is that his attention was not only drawn to the requirements of the Act, but to the character of the settlement and entry of Jacobus.

Lee v. Johnson, 116 U. S. 51.

We look in vain to find a single fact, circumstance or expression which sustains the bare assumption or conjecture that the Secretary referred to fraud in the affidavits called supplemental proofs. They were truthful in fact. There was no concealment of facts or of purpose. They are found on pages 261 and 262 of the record. Jacobus states therein the sale of the land to McCord and McLeod. That on the 5th of September, 1893, he secured from them a reconveyance of the title, giving to them a mortgage for the sum he received or was to receive from them. He states abandonment after sale and going back upon the land about February 20, 1893, and that such action on his part was with a view to enable him to make the supplemental proof required to the Land Department. McCord states: "That in making the purchase we paid the full value of the land, and we have made a reconveyance of said title to said land for the purpose of protecting the entryman and his title to said land." Jacobus in his testimony upon the

contest frankly states: (p. 161 Rec.), in answer to the question, "Why was it, after you had made proof on the land, and you believed the proof to be good, and you had sold the land, that you still continued your residence upon it? Ans: For the reason, as I stated, that I sold this land, and if there was such a thing, * * I wasn't going to let the men who bought the land from me be the loser by it. I was going to make him all right. That was the reason, and the only reason."

This testimony was given upon an inquiry whether the reasons stated in the affidavits were sufficient to dispense with supplemental proof, which could not be made. It was in explanation of the affidavits themselves. No secret purpose whatever was concealed. The affidavits without such explanation were equally as frank. They disclosed he had taken a reconveyance so as to enable him to comply with the order of the Commissioner. He gave a mortgage back for the full value, $4250. If his entry was confirmed it was for the benefit of McCord to the extent of $4250, which was the full value of the land.

Reference again to the Herbert Augusta case is important, as it will be observed that Jacobus was attempting to do what the Secretary did do in the Herbert Augusta case, that is, protect the transferees. He exercised his equitable powers as an officer to accomplish that result. The equity is just the same where the motive is the same, whether voluntarily exercised by the party or judicially by a tribunal. Can there be such a thing as fraudulent equity? With these facts before him, and required specially to apply to them the doctrine announced in the Herbert Augusta case, is it reasonable to assume that the Secretary would characterize these affidavits as fraudulent proofs and charge the party with fraud in making them?

Indications of Bad Faith.

The Secretary must be presumed to have knowledge of the laws and rules of his Department. Some of them are here given as sustaining his determination that the entry was in bad faith and the proofs necessarily fraudulent.

A rule of the Department provides, "parties cummuting homestead entries cannot be excused from any cause for failure to live upon and cultivate the land for the required

period. They are not obliged to make proof in so short a time in which commutation is allowed, and when such proof is made, full compliance with the law must be satisfactorily shown."

Circlar General Land Office, July 11, 1899, page 24.

Poverty is not an excuse and is not consistent with good faith in commutation.

4 Land Decisions, 185. *5 Land Decisions*, 448.
3 " " 543. *7* " " 467.
11 " " 497.

Where there is any doubt as to actual and continuous residence, a homestead entry cannot be commuted. In such case the proof of residence must be explicit.

4 Land Decisions, 477.

Offer of commutation proof should receive special scrutiny when made within the shortest possible time.

4 Land Decisions, 347.
5 Land Decisions, 349.

Suppression of material facts taken in connection with the effort to prove up in the shortest possible time while alleging poverty, nullifies all claim of good faith.

6 Land Decisions, 265.

An absence from the land immediately following final proof, setting up housekeeping elsewhere, is an indication of bad faith.

5 Land Decisions, 449.

In determining good faith, fitness of the land as a permanent abode, the period of inhabitancy and the claimant's relation to the land after proof, may be considered.

11 Land Decisions, 450.

Residence is not required or maintained by going upon the land for the purpose of merely complying with the letter of the law.

66 Land Decisions, 248. *8 Land Decisions*, 285-331.
16 " " 22.

The rule is well settled that to establish a residence there must be concurrent with the act of settlement, an intent to

make a home on the land to the exclusion of a home elsewhere.

4 Land Decisions,	276.		*5 Land Decisions*,	179.	
4 "	"	512.	*9* "	"	340.
6 "	"	450.	*16* "	"	22.

The undisputed evidence shows the land in question was in an unbroken forest, heavily timbered with pine, its chief and practically only value. Jacobus planted a few potatoes (p. 141 Rec., pp. 150-151); the total sales amounted to $3.50; and he hired a man to dig them. A little hay was raised (p. 143 Rec.), which was spoiled. He did nothing himself,—even hired his wood cut. He did not even dig a well. (P. 154 Rec.)

It is a general rule that transactions subsequent to final proof are admissible to show the intention of the claimant.

Bennett v. Cravens, 12 Land Decisions, 647.

This Court has stated in a case where the facts were very similar to those in the case at bar: "If in any case it appears from the evidence that the claim of the complaining or moving party is against public policy or the law, so that in no event could he recover a final judgment or decision, whatever may be the nature or extent of the testimony upon the point at issue, the tribunal should not hesitate to dismiss the suit or proceeding. * * Such party *must in all cases* show that but for the error or fraud or imposition of which he complains, *he would be entitled to the patent*. It is not enough to show that it should not have been issued to the patentee."

Lee v. Johnson, 116 U. S. p. 50.

If this rule is applied here, it must be determined not only that the evidence fails to show that Jacobus was entitled to a patent, but that it conclusively appears therefrom that if a patent had been issued to him it would have been the result of fraud in his entry, and fraud in his final proofs, because the evidence discloses beyond any controversy, that both were fraudulent.

Ground of Decision of State Court.

The last decision of the State Supreme Court was based upon three propositions: 1—That the reference by the

Secretary in his opinion to fraudulent proofs and practice related to supplemental proofs; 2—That the local officers in granting the commutation certificate, by that act, determined the proofs were not fraudulent, and the entry was in good faith, which determination had not been reversed; 3—That Hill became a trustee for McCord by reason of an estoppel.

The first of these propositions we have discussed. With respect to the second, it is sufficient to state that the decision of the Commissioner of January 23, 1895 (p. 217 Rec.), states in language that cannot be misunderstood, that the entry was in bad faith. He states, "the case is similar to the case of Alonzo W. Laird, and that in that case it was held that one who enters with no intention of establishing residence in good faith, and subsequently submits fraudulent final proofs," etc.

The Secretary of the Interior on the motion to review states that "the *evidence* in the case at bar clearly shows that the entry was not made in good faith and the proof submitted by the entryman was fraudulent." Almost the same language used in the case of Alonzo W. Laird, quoted by the Commissioner. Hence it is that the State Court must have been mistaken when it stated that the determination of the local officers, only evidenced by the act of allowing commutation, had not been reversed as to good faith of the entry.

This Court cited with approval a statement in an opinion rendered by Secretary Vilas, as follows: "The preemption purchaser takes by his final proofs, and payment and his certificate of purchase, only a right to a patent for the public lands, *in case the facts* shall be found by the General Land Office and the Interior Department to warrant the issue of it. Whatever claim to a patent he possess by virtue of his payment and certificate, is dependent upon the action of the Department and its *future finding* of the existence of the conditions, and his compliance in fact with the prerequisites prescribed by law to the rightful acquisition of the public land he claims," and held that the Department had authority at any time before patent issues to inquire whether the original entry was in conformity to the Act of Congress.

Hawley v. Diller, 178 U. S. 476.
Michigan Land & Lbr. Co. v. Rust, 168 U. S. 589.

This Court also said: "The obligations of the oath of office of the Secretary of the Interior oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it.

Knight v. United States Land Assoc., 142 U. S. 161.

There is no pretense whatever that the entry was in good faith or that the proofs were not in fact fraudulent. A party should come into a court of equity with clean hands.

Estoppel.

The third question involved is that of estoppel. (9th and 10th Specifications of Error.

The complaint alleged (p. 40 Rec.) "that thereafter (the issue of the commutation certificate), and sometime in the month of December, 1892, Warren E. McCord, together with one Daniel McLeod, had some negotiations with the said Jacobus for the purchase of said land from him, he then being the full equitable owner thereof under his said entry certificates of said register and receiver. That during the pendency of negotiations for the purchase of said land by said plaintiff and said McLeod, they had an interview with the defendant Hill, in which interview the said defendant stated to said plaintiff and McLeod, that he did not have and would not make any claim to said land; that he had been fairly beaten in his contest with Jacobus, and that if the plaintiff should buy the said land he would make no claim to it; that the plaintiff relied upon such statements of said Hill in making their purchase of the land, and thereafter they purchased," etc. * * "The plaintiff further shows that thereafter, and on or about the 4th day of January, 1893, *for the purpose of putting the understanding* between said plaintiff and McLeod in writing, the said parties entered into the following agreement."

The agreement is given later.

McCord testifies (p. 239 Rec.) under objection, that the agreement was in writing, etc. "We asked him (Hill) if he had any claim on the land and he said no. He said he had been fairly beaten in his contest with Jacobus, and made no claim to it whatever. I had a previous conversation with him in which he advised us to buy the land of Jacobus. He said if we would give him some logs he had skidded up there, that he could sell down to Iron River to help him

along a little, he would be perfectly satisfied, and let him live on there until the first of May." * * "Plaintiff's exhibit "J" is Hill's relinquishment with us that he would not make trouble on the claim."

On cross-examination (p. 246 Rec.), referring to a previous examination before one Rogers; Question: Was this question asked you, You didn't buy on what Hill said? You bought on the strength of Jacobus' title? and did you answer, Yes, sir? Ans. I think so.

The foregoing is all of the testimony of McCord upon this subject. It does not meet the allegations of the complaint, and states expressly that the whole agreement was reduced to writing, and was simply a relinquishment of his then present claim to the United States.

The writing referred to is as follows (p. 40 Rec.), and is set out in full in the complaint:

"For the purpose of making a settlement with John F. Hill and his relinquishment on the N. W. ¼ of section 17, town 48, range 8 W., we hereby make him a present of a certain lot of logs, now skidded on said land, and give him permission till the first day of May, A. D. 1893, in which to enter on said land to remove said logs, and to occupy the house on said land and to remain on said land until that date, but not thereafter. Said logs amount to about 30,000 feet, and he agrees not to cut nor allow any of his men to cut or destroy any other timber. And in consideration of said logs, I, John F. Hill, being duly sworn, on oath, says that he is the man who made a soldier's application for said N. W. ¼ of 17-48-8 W., and I make this affidavit for the purpose of relinquishing all my right, title and interest in and to said claim, which I do unto the United States. Signed, sealed and delivered and agreed upon this 4th day of January, A. D. 1893.

In Presence of
W. H. PACKARD.
TRACY LYON.

DANIEL MCLEOD.
W. E. MCCORD. (Seal)
JOHN F. HILL. (Seal)

STATE OF WISCONSIN, } ss.
Bayfield County, }

Personally came before me, this 4th day of January, A. D. 1893, the above named John F. Hill, to me known to be the person who executed the foregoing instrument, and acknowledged the same. W. H. PACKARD, Notary Public.

It will be observed this is merely a relinquishment to the United States, made after McCord had purchased the land, and does not contain any statement such as testified to by McCord. Under familiar rules such writing is conclusively presumed to speak the whole agreement.

The State Court in its first opinion (p. 19 Rec.), concluded there was no estoppel. That the only element of estoppel that could possibly have existed was the statement that "he had been fairly beaten in his contest with Jacobus." (But that defeat was on the sole ground that Jacobus had a prior right of entry.) "That none of his other declarations or promises are inconsistent with the claim Hill now makes."

In the second opinion (p. 23 Rec.), these declarations were not disturbed. In the last opinion (p. 301 Rec.), the Court held that Hill's statement would constitute an estoppel, if the Court is wrong in its construction of the decision of the Land Department.

In this last decision of the Supreme Court, they assert that appellant must be charged as constructive trustee of the whole title for the respondent, and decreed to convey it to him, if the construction we have placed on the various decisions of the Land Office be erroneous and that contended for by appellant be correct. The Court only reaches this conclusion in case the ground upon which the case is decided is found to be untenable, and hence the determination of the Federal question as to the proper construction of the Satute and decisions of the Department is essential in order to give force and effect to the alternative determination. If that Court is correct in the construction it has given to such act and decisions, then there could be no estoppel, as the title must be confirmed in McCord under the law. So that in either event this Court must pass upon the question of the proper construction of such Act and such decisions, and the rights of the parties under them. What is urged as an estoppel, if it had any force or existence, is not an independent ground sufficient to sustain the judgment, but an element growing out of and inseparably connected with the question of construction stated, and rights of the parties under such Act and decision.

Estoppel is not pleaded or claimed as a ground of relief.

The alleged conversation is stated (p. 40 Rec.) as a mere preface to the written relinquishment. It is expressly averred "that for the purpose of putting the understanding in writing the said parties made and entered into the following agreement" (here follows the relinquishment), and all that is claimed for the conversation in the complaint is that it was an agreement afterwards reduced to writing to relinquish all claim to the land to the United States. No claim is made that it operated as an estoppel, nor is any relief demanded or prayed on any such ground.

If, however, such issue was involved, and might be considered an independent ground, still its determination requires a construction of the laws of the United States.

The estoppel, if any, reaches back to the relinquishment, and the question is thereby presented whether Hill, under the homestead laws, was precluded from initiating such contest by reason of such relinquishment or the prior verbal understanding. Further, the question is presented whether under the homestead laws, Hill was precluded by reason of such relinquishment and prior verbal understanding from making an entry of the land and its allowance by the land officers.

Beyond all this, however, it presents the important question whether a homestead entry can be made or confirmed for the benefit of another or to inure to another. This interview, preceding the relinquishment, was prior to the preference right of entry awarded Hill, and hence prior to his application to enter. The law requires that the applicant in his application shall state under oath, "that his application is honestly and in good faith for the purpose of actual settlement and cultivation, and not for the *benefit of any other person*, persons or corporation, and that I will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence and cultivation necessary to acquire title to the land applied for; that I am not acting as agent of any person, corporation or syndicate in making such entry, nor in collusion with any person, corporaaion or syndicate, to give them the benefit of the land entered, *but in good faith to obtain a home for myself*, and that I have not directly or *indirectly* made, and will not make any agree-

ment or contract in any way or manner with any person or persons, corporation or syndicate whatsoever, by which the title I might acquire from the government of the United States should *inure* in whole or in part to the benefit of any person except myself."

In the decision of the Commissioner in the case at bar, he refers to the case, *Dougherty*, 10 L. D. 79, and states that in that case the request of counsel for entryman to make a new entry was denied for the reason that he cannot make a homestead entry for the benefit of another, for the entry must be for his own exclusive use and benefit.

Not only is the homestead laws in question, but it is conclusive that there can be no such thing as title inuring to another of a homestead by reason of a prior estoppel. If Hill had made an agreement with McCord to convey the homestead when obtained to McCord, such agreement would be absolutely void and could not be enforced. If he had conveyed the land with covenants of warranty, the title when obtained by Hill would not inure to McCord. How, then, can a mere casual conversation, not amounting to an agreement, have any such effect?

There was not a single element of estoppel in the transaction. That he was fairly beaten was but the expression of a mere opinion, not the representation of a material fact. It had no reference to the acquisition of a new and independent title. He performed all he agreed, to wit, relinquishment to the government of all claim.

Union Mut. L. Ins. Co. v. Mowry, 96 U. S. 544.
Aiken v. Kellogg, 119 N. Y. 449.
Mitchell v. Fisher, 94 Ind. 108.

It does not appear he had full knowledge of the facts which resulted in determining the invalidity of the Jacobus entry.

Brunt v. Virginia Coal & Iron Co., 93 U. S. 326.
Fay v. Tower, 58 Me. 286-290.

Nor there was an intention to mislead or culpable negligence.

Brunt v. Virginia Coal & Iron Co., 93 U. S. 326.
Kingman v. Graham, 51 Wis. 246.

Nor but what McCord had the same means of knowledge.

Brunt v. Virginia Coal & Iron Co., 93 U. S. 326.

An estoppel by declaration relates only to the subject of the declaration, and does not prevent the party from relying upon an independent matter or a subsequently-acquired right.

Clark v. Hale, 74 Mass. 187.
Bigelow v. Woodward, 81 Mass. 560.
Thrift v. Delaney, 69 Cal. 188.

It never applies to shield or protect a fraud.

Mistake of Law Alleged not Found by the Court.

(11TH SPECIFICATION OF ERROR.)

The mistake alleged was in holding that because Jacobus was unable to make supplemental proof he was thereby excluded from the provisions of the Act of June 3, 1896. That it was never found by any of the officers of the Land Department, in any of said proceedings, that there was any fraud or lack of good faith on the part of said Jacobus. (P. 51 Rec.)

The decision of the State Court goes entirely upon the ground of fraud in making the supplemental proofs. A ground expressly negatived by the complaint.

This is more than mere matter of practice. It relates to a right. Some courts have held that it is an excess of jurisdiction.

In any event, the allegations of the complaint conclusively show that the pleader never intended to claim there was any fraud in the supplemental proofs, or that any supplemental proofs were ever made, but on the contrary, that Jacobus could not make supplemental proofs, by reason of the sale of the land.

Determination of Facts by the Court.

(12TH SPECIFICATION OF ERROR.)

The trial Court determined for itself the facts as to entry, settlement, residence and improvements upon the land by Jacobus, from the evidence and records in the case which was before the Commissioner, instead of determining what facts were determined by the Commissioner or Secretary.

The Supreme Court had tersely stated in its former opinion, that the question was not what were the facts, but what facts the officers of the Land Department had determined to exist. One peculiarity about these findings is that there is not a particle of evidence to support them; that the Court placed itself in the position of the Commissioner. That the determination of the Court reverses that of the Commissioner. These determinations of the Court were of matters of fact, and it should have known that the decision of the Commissioner as to such facts was conclusive.

Judgment Supreme Court.

(13TH, 14TH AND 15TH SPECIFICATIONS OF ERROR.)

These specifications relate to the judgment of the Court. It is assigned as error. It was erroneous for the reasons and upon the grounds hereinbefore stated and discussed. The decision that its former decision upon demurrer was *res adjudicata* upon certain questions is perhaps unimportant here. Of course it could not be, as only the decision of the highest Court qualified to pass upon the question can establish the law of the case. Otherwise we might have conflicting rules of law applicable to the same case.

McCord was not a Purchaser in Good Faith.

(16TH SPECIFICATION OF ERROR.)

McCord testifies: "I was president of the Bank of Iron River. I was interested in the water-works, and in buying timber there. (P. 241 Rec.) We were just starting in dealing in lands as partners together. That was the first claim we bought together." (P. 239 Rec.)

He was dealing in claims. He knew it was against the policy of the law. The abstract in evidence showed mortgage from Jacobus to McCord, October 8, 1892, two months prior to his deed, being the amount required to commute. (P. 242 Rec.) McCord states, however, he knew nothing about that mortgage. (P. 242 Rec.)

McCord obtained a relinquishment from Hill before he purchased, and states he was induced to purchase by Hill's representations that the latter had been fairly beaten. This shows he had doubts sufficient to put him upon inquiry. He deeds back to Jacobus September 5, 1893. This deed

remains in force until after the final decision of the Secretary, to wit, October 17, 1896. If this should be considered the date of his purchase, then such purchase was made with a full knowledge of all the facts and conditions, including the decisions of the Commissioner and Secretary that Jacobus's entry could not be confirmed.

Again: If Jacobus practiced fraud in making his supplemental proofs, McCord was a party to that fraud, and shared the intent and purpose. How can he consistently claim that he comes into Court with clean hands? If any fraud was attempted upon the goverment, it was sufficient to deny confirmation when prayed for on equitable grounds. Such fraud ought to be a sufficient reason, using the language of the Act of Congress, in the discretion of the Commissioner to deny confirmation of an entry.

Respectfully submitted,

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